SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 766

MAX JAKOB,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MAX JAKOB,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered in the above-entitled case on September 12, 1966.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, is printed in Appendix B, pp. A-7–A-46.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 12, 1966 (Appendix D, p. A-61).

The order of Mr. Justice Harlan, dated October 8, 1966, granting the extension of time within which to petition for certiorari set November 11, 1966 as the final date for filing this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the failure of the prosecution to turn over relevant grand jury testimony of a government witness, such testimony containing inconsistencies with the testimony at trial, in and of itself constitutes reversible error.

   (a) Whether the procedure followed by the trial court of inspecting the grand jury minutes *in camera* to determine whether they are relevant to and inconsistent with the witness's trial testimony and then deciding whether the failure to produce them was prejudicial to the defense constitutes reversible error.

   (b) Whether it is reversible error on the part of the trial court to treat as "harmless error" the failure of the prosecution to turn over to a defendant relevant prior inconsistent grand jury testimony of witnesses for the prosecution.

2. Whether it was reversible error on the part of the trial court to treat as "harmless error" the failure of the prosecution to turn over to the defendant in the instant case relevant prior inconsistent grand jury testimony.

3. Whether comment upon Petitioner's failure to testify violated Petitioner's privilege against self-incrimination under the Fifth Amendment.

Constitutional Provisions and Statutes Involved

Involved herein are Amendment V to the United States Constitution; Section 3500, Title 18, United States Code; Section 2314, Title 18, United States Code; Section 2315, Title 18, United States Code; and Section 371, Title 18, Uniited States Code (Appendix A, pp. A-1–A-6).

Statement of the Case

Petitioner was convicted of participating in a conspiracy to steal, transport and dispose of securities valued at over $5,000 in interstate and foreign commerce in violation of Title 18, U. S. Code, Sections 2314, 2315 and 371, and of the substantive count of transporting such securities in violation of Title 18, U. S. Code, Section 2314. On December 16, 1965, Petitioner was sentenced to one year and one day on each of the foregoing counts, the sentences to run concurrently, and fined $10,000.

Petitioner's conviction was the result of a typical mass conspiracy trial, involving six defendants at its termination; the indictment named sixteen defendants and six other co-conspirators. The trial, the minutes of which extended to over 3,300 pages, lasted from October 18 until November 10, 1965. It resulted in conviction of Petitioner who it was alleged conspired to steal, transport and dispose of securities belonging to the New York brokerage house, Bache & Co., in interstate and foreign commerce and who it was further alleged transported stolen securities from New York, New York to Newark, New Jersey, such transportation having been undertaken as part of the conspiracy.

Much of the government's case rested on the testimony of defendants Dodge, Pomeranz, Sessler, Gladstone and Markowitz, who testified for the prosecution. Most of the government's case with respect to Petitioner rested on the testimony of Gladstone and Markowitz. The number of defendants, the nature of the offense charged, the number of witnesses and the length of their testimony in combination resulted in an extremely complex and involved trial.

The conspiracy referred to in the trial allegedly had its beginnings in November, 1961, when defendant Gordon Tallman told defendant Robert Dodge that he had access to and could obtain for disposal large quantities of negotiable instruments, and allegedly lasted until July 20, 1962, when defendants John Lombardozzi and Joseph G. Martinelli were arrested at the Robert Treat Hotel in Newark, New Jersey, in possession of stolen securities. According to the government's witnesses, Gordon Tallman, an employee of Bache & Co., over a period of time in late May and early June, 1962, stole approximately $1,000,000 of "blue chip" securities registered in that firm's name and turned them over to Robert Dodge for distribution and ultimate sale. The securities were then passed along to other members of the conspiracy for disposal. After two unsuccessful attempts to sell the securities through New York brokerage houses, some of the conspirators attempted to dispose of them at a meeting at the Robert Treat Hotel in Newark, New Jersey. This meeting, which had been engineered by the FBI, resulted in the eventual arrest of the conspirators.

After the trial, on December 3, 1965, the Assistant United States Attorney turned over to the trial judge certain prior grand jury testimony of a government witness, FBI Agent

Joseph McDonald, stating that it had been discovered in the government's files only after the trial was over. This testimony dealt with Agent McDonald's observation of Clott, an alleged Government informant, and Gladstone. Since Gladstone was the principal witness against Petitioner, it is clear that anything relating to Gladstone held great importance for Petitioner. The government said that it discovered this grand jury testimony in preparation for the trial of two other originally named defendants, Lekacos and Lavas (Appendix C, p. A-47).

Several counsel moved for a new trial on the basis of the belated production of this transcript.* The Court denied the motions for the new trials, but did direct the United States Attorney to deliver the grand jury testimony to the Clerk who was then directed to seal it and to keep it so sealed for possible use in any appeal.

Holding that *Jencks* v. *U.S.*, 353 U.S. 657 (1957) and 18 U.S.C. Section 3500 have no application to grand jury minutes, the trial court in the instant case followed the procedure approved by the Second Circuit in *United States* v. *Spangelet*, 258 F. 2d 338 (1958), saying with regard to Agent McDonald's testimony (Appendix C, p. A-52):

> "'[While portions of grand jury testimony do not relate to the subject matter of the trial testimony;] the balance of the grand jury testimony does so relate and if known at the trial would have been subject to the direction to turn over to counsel for the defendants, whether inconsistent or not. From my reading

* The trial court ruled that any objection raised by counsel for one defendant was to be treated as having been raised on behalf of all of the defendants.

of this balance of the grand jury testimony, there appears to be inconsistencies.' "

However, it found that no prejudice arose from the failure to turn over this material to the defense.

In discussing this point upon appeal, the United States Court of Appeals for the Second Circuit stated that it saw "no more than 'harmless error' in the Government's inadvertent failure to turn over F.B.I. Agent McDonald's grand jury testimony at trial." It approved of the trial court's determination that even if such inconsistency between McDonald's testimony before the grand jury and at the trial discredited the agent "'it wouldn't have the slightest effect on the verdict.'" (Appendix B, p. A-39).

In addition to the foregoing, during the trial the prosecution referred to Petitioner's failure to testify. The prosecution stated: "He [counsel for Petitioner Jakob] forgot to mention for instance, that William Gladstone testified, uncontradicted, that he, Gladstone, told Jakob on or about July 2—." Out of the hearing of the jury Petitioner's attorney immediately moved for the declaration of a mistrial on the ground that the prosecution made reference to the failure of Petitioner to take the stand. The court denied the motion for mistrial and undertook to rectify the situation by an instruction to the jury. Exception was duly noted.

Reasons for Granting the Writ

1. The decisions of the courts below in the instant case are directly in conflict with the decisions of the 6th Circuit Court of Appeals in *Bergman* v. *United States*, 253 F. 2d 933 (6th Cir. 1958), the 3rd Circuit Court of Appeals in *United*

States v. *Prince*, 264 F. 2d 850 (3rd Cir. 1959), and the 7th Circuit Court of Appeals in *United States* v. *Sheer*, 278 F. 2d 65 (7th Cir. 1960). A conflict between the Courts of Appeals was adverted to by the court below (Appendix B, p. A-40):

> "Although one court has suggested that the failure to produce prior statements of government witnesses is ground for reversal even in the absence of any demonstration of prejudice, *Bergman* v. *United States*, 253 F. 2d 933, 935 (6th Cir. 1958), we have declined to reverse where non-production could properly be classified as 'harmless error,' see *United States* v. *Kahaner*, supra at 473."

The heart of the conflict is whether the non-production of prior inconsistent statements of government witnesses can be dismissed as "harmless error," as was done in the instant case. The government failed to furnish defendants with certain prior grand jury testimony of FBI Agent Joseph McDonald. Both the District Court and the Circuit Court of Appeals recognized inconsistencies between Agent McDonald's testimony at trial and his grand jury testimony, and it is well established that it is error not to produce at trial such prior grand jury testimony. *U.S.* v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958); *U.S.* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959).

In *Bergman* v. *U.S.*, *supra*, *U.S.* v. *Prince*, *supra*, and *U.S.* v. *Sheer*, *supra*, where the non-production of the materials in question was error under the mandate of the Jencks Act, 18 U.S.C.A. § 3500, it was held that it was not the function of the court to determine whether defendant was prejudiced by the failure to make available the relevant portions of prior materials.

Therefore, the conflict between the decision in the instant case and the three cases cited heretofore becomes apparent. In the instant case, the trial court and Circuit Court of Appeals held that error arising out of the failure to provide the defense with materials to which it is entitled can be cured by application of the "harmless error" rule. In the other three cases, the Circuit Courts of Appeals held that error arising out of the failure to provide the defense with materials to which it is entitled cannot be cured by application of the "harmless error" rule.

2. The decision of the court below is believed to be erroneous and the conflicting decisions of the 3rd, 6th and 7th Circuit Courts of Appeals correct. Moreover, the decision of the court below approves of an approach criticized by this Court in *Dennis* v. *United States*, 384 U.S. 855 (1966), and *Clancy* v. *United States*, 365 U.S. 312 (1961), therefore conflicting with those cases in principle.

In dismissing the failure to produce relevant material as "harmless error," the court runs headlong into the fundamental problem that it is in no position to foresee what effect upon the course of the trial the production of such materials might have had. As the Court stated in *Clancy* v. *United States*, 365 U.S. 312 (1961) at page 316:

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively. As we said in *Jencks* v. *United States, supra*, 667:
>
> 'Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast

> in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.' "

The difficulty with having the trial judge make a determination with respect to the prejudicial effect of a failure to produce relevant material is further stated in *Dennis* v. *United States*, 384 U.S. 855 (1966) at pages 874-875:

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

3. The question of the applicability of the "harmless error" rule to the failure of the prosecution to produce required materials in a criminal trial clearly is of importance in the administration of criminal justice. Moreover, further clarification of the procedure to be followed with respect to prior grand jury testimony of government witnesses is needed.*

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* The importance to be attached to problems relating to the production of prior statements of government witnesses becomes evident from a consideration of the frequency with which this Court has granted certiorari in cases involving problems arising in the aftermath of *Jencks* v. *United States*, 353 U.S. 657 (1957). Cases involving these questions in which certiorari has been granted are: *Dennis* v. *United States*, 384 U.S. 855 (1966); *Campbell* v. *United States*, 373 U.S. 487 (1963); *Clancy* v. *United States*, 365 U.S. 312 (1961); *Killian* v. *United States*, 368 U.S. 231 (1961); *Scales* v. *United States*, 367 U.S. 203 (1961); *Campbell* v. *United States*, 365 U.S. 85 (1961); and *Palermo* v. *United States*, 360 U.S. 343 (1959).

The decisions of this Court have gradually been defining when the defense is entitled to the production of relevant materials and the procedures to be followed with regard to such production. In *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959), the Court held that the right of a defendant to production of grand jury testimony is not absolute, but did not define the circumstances under which such a right would apply. In *Rosenberg* v. *United States,* 360 U.S. 367 (1959), this Court held that a failure to produce a letter written by a witness to the Assistant United States Attorney was not reversible error where the defense was *already in possession of the information* contained therein. In *Dennis* v. *United States,* 384 U.S. 855, 875 (1966), this Court held that the trial court should not become involved in extensive *in camera* proceedings to determine whether the grand jury testimony was inconsistent with the trial testimony but that the trial court's function is "limited to deciding whether a case has been made for production, and to supervise the process."

However, this Court has not definitely ruled upon the applicability of the "harmless error" rule to the failure to produce such materials. Such a determination is needed, because the application of the "harmless error" rule could well vitiate the policy of producing relevant materials established by this Court since *Jencks* v. *United States,* 353 U.S. 657 (1957), and the procedural safeguards developed with regard thereto. If, after the termination of the trial or after the materials are no longer useful during the trial, the Court can hold *in camera* proceedings and determine that the defendant was not prejudiced by the failure to produce the materials, as was done in the instant case, the

efficacy of defendant's right to the production of such materials is undermined. For, whether the trial court undertakes to weigh and examine such material during or after trial, the fact remains that, as this Court but recently held, "the determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966).

4. Even if this Court should determine that the "harmless error" rule can be correctly applied to the failure to produce relevant grand jury testimony, the courts below erred in applying it in the present case.

Both the trial court and the Circuit Court of Appeals found inconsistencies between Agent McDonald's trial testimony and grand jury testimony. The testimony in question dealt with Agent McDonald's observation of Clott and Gladstone. Failure to produce the grand jury testimony is unquestionably prejudicial to Petitioner even if the testimony in question does not mention him directly but deals with Gladstone and Clott. Since Gladstone was the principal witness against Petitioner, and since the theory urged by Petitioner's counsel was that Gladstone was implicating Petitioner falsely in order to minimize Gladstone's own role in the conspiracy, the testimony pertaining to Gladstone's activities was obviously of the highest importance to Petitioner.

Moreover, testimony concerning Gladstone's activities bore directly upon Petitioner's liability under the second count of the indictment. The prosecution's evidence indicated that Gladstone had been directly involved in the substantive offense of transporting the stock for which Peti-

tioner was convicted on the basis of his alleged membership in the conspiracy, under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946). It cannot seriously be doubted that Petitioner was entitled to the testimony involving a co-defendant for whose acts Petitioner was held vicariously liable.

Prior testimony of Agent McDonald has an even higher order of importance than would appear on the surface. It is uncontradicted that Agent McDonald sat at the prosecution's counsel table during the trial in the full view of the jury and assisted the prosecution in making delivery of prior statements of government witnesses to defense counsel. He therefore testified not merely as a prosecution witness, but as if he was clothed with the asserted impartiality of the government itself. Any inconsistency, therefore, in that witness' testimony was one which the Petitioner should have had the opportunity to exploit.

5. The decision of the Circuit Court of Appeals in the instant case upon the comment on Petitioner's failure to testify is in apparent conflict with the decision of this Court in *Stewart* v. *United States*, 366 U.S. 1 (1961).

The prosecution, by commenting upon Petitioner's failure to testify, and the trial court, by drawing the jury's attention to this comment by an improper admonition relating to the comment, violated Petitioner's Fifth Amendment right not to testify.

During the summation the prosecution stated: "He (Gelb) forgot to mention for instance, that William Gladstone testified, uncontradicted, that he. . . ." After Petitioner's attorney objected to this comment, the court instructed the jury as follows (Appendix C, pp. A-59–A-60):

> "The Court: Members of the jury, tomorrow when I give you my instructions, I will have occasion to tell you a defendant has the absolute right not to testify and that you are not to draw any inference unfavorable to the defendant by his failure to testify. Now if Mr. Stillman's suggestion was designed—and I don't think it was; I certainly think it was unintentional—to ask you for an inference unfavorable to Mr. Jakob because the testimony to which he referred of Mr. Gladstone was uncontradicted, I will have to tell you to disregard it and to draw no such inference. We will cover it tomorrow in our instructions. That is enough for the present."

The prosecution's comment upon Petitioner's failure to testify was improper. *United States* v. *Curtiss*, 330 F. 2d 278 (2d Cir. 1964); *Ing* v. *United States*, 278 F. 2d 362 (9th Cir. 1960); *Milton* v. *United States*, 110 F. 2d 566 (D.C. Cir. 1940). The court's comment concerning this impropriety further aggravated it by assuring that the jury's attention was drawn to it and to the fact that Gladstone testified "uncontradicted," as a result of Petitioner's failure to take the stand. It is, of course, the probable interpretation of the given remark by the jury which determines whether it falls within the prohibition, *Knowles* v. *United States*, 224 F. 2d 168 (10th Cir. 1955).

The court below held that the instructions pertaining to Petitioner's failure to testify were proper. That holding sharply conflicts with the principles as to curative instructions laid down by this Court in *Stewart* v. *United States*, 366 U.S. 1, 9-10 (1961):

> "'The Government's final contention is that even if the error was prejudicial the conviction should be allowed to stand on the theory that the error was not

sufficiently prejudicial to warrant the granting of a mistrial and the defense made no request for cautionary instructions. One answer to this argument is to be found in the Government's own brief. For, in its argument regarding the possibility that the jury may not have been aware of the improper question, the Government stresses the fact that the question was not emphasized by any reference to it in the instructions to the jury. During the course of this argument the Government expressly recognizes that the danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. . . .' "

The procedure to be followed with respect to the Fifth Amendment rights of defendants in criminal actions not to testify should be clarified. It is submitted that no comment upon a defendant's failure to testify should be permitted, that any such comment should result in a mistrial and be reversible error upon appeal, and that such comment cannot be cured by a curative instruction drawing further attention to the comment.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted the petition for writ of certiorari should be granted.

Respectfully submitted,

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